AUG 3 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 494

GEORGE KASTENBAUM, *Petitioner,*

v.

THE FLORIDA BAR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RAYMOND W. BERGAN
1000 Hill Building
Washington, D. C. 20006
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	7

TABLE OF AUTHORITIES

CASES:

Appeal of Smith, 65 Conn. 135, 31 Atl. 529 (1894)	4
Bradley v. Fisher, 80 U.S. 646	6
Brooks v. Auburn University, 296 F.Supp. 188 (M.D. Atl. 1969), *aff'd* 412 F.2d 1171 (5th Cir. 1969)	4
Coppedge v. United States, 369 U.S. 438	4
Donnell v. Board of Registration, 128 Me. 523, 149 Atl. 153 (1930)	4
In Re Metheany, — Ariz. —, 449 P.2d 609 (1969)	7
In Re Ruffalo, 390 U.S. 544	6
Rodriguez v. United States, 395 U.S. 327	4
Schware v. Board of Bar Examiners, 353 U.S. 232	6
Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551	6

OTHER:

18 U.S.C. § 1951	1, 2, 4
28 U.S.C. § 1257(3)	2
Rule 38, F.R. Crim. P.	4
Rules 4(b), 10, 11, 12, F.R. App. P.	4
Rule 11.07, The Integration Rule of The Florida Bar	1, 3, 5, App. A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

GEORGE KASTENBAUM, *Petitioner,*

v.

THE FLORIDA BAR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, George Kastenbaum, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida suspending him from the practice of law in the State of Florida, pursuant to Article 11.07(3) of the Integration Rule of the Florida Bar,[1] following his conviction in the United States District Court for the Southern District of Florida for a violation of 18 U.S.C. § 1951.

---

[1] This rule appears at 225 So.2d 881 (1969). It is reprinted as Appendix A to this petition.

OPINION BELOW

There is no opinion by the Supreme Court of Florida. The Court's one-sentence order suspending the petitioner and denying him a hearing is found as Appendix B to this petition.

JURISDICTION

Judgment of the Supreme Court of Florida was entered on May 6, 1970. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether suspension by the Supreme Court of Florida violates the Fourteenth Amendment to the United States Constitution when it is founded upon a non-final conviction in a federal court, an appeal from such conviction being then (and now) pending in the appropriate United States Court of Appeals.

2. Whether a suspension under the conditions just related so burdens the federal right of appeal as to be unconstitutional.

3. Whether the petitioner was denied due process by the failure of the Supreme Court of Florida to grant him a hearing prior to the entry of its order of suspension.

STATEMENT OF THE CASE

Petitioner George Kastenbaum is an attorney who, for more than twenty years, has been admitted to practice in the courts of the State of Florida. On February 12, 1970, he was convicted by a jury in the United States District Court for the Southern District of Florida for a violation of 18 U.S.C. § 1951. His post-

trial motions were denied and, on June 7, 1970, he was sentenced to a term of imprisonment. An appropriate Notice of Appeal was filed on June 12, 1970 and his case is presently pending in the United States Court of Appeals for the Fifth Circuit, No. 30019.

On April 8, 1970, acting pursuant to Article 11.07(3) of the Integration Rule of the Florida Bar, The Florida Bar filed a petition for suspension in the Court below. Record, Item 1.[2] Petitioner responded under oath, denying his guilt, raising the constitutional unfairness of a suspension based upon conviction then on appeal, Record, Item 4, and sought a hearing, Record, Item 2, at which he stated, through counsel, that he would present evidence explaining the circumstances of his conviction, testimony to show his good character, and other competent evidence in mitigation. He further stated that "due process requires that [petitioner] have the opportunity to be heard in person and through witnesses" on the suspension application. *Id.* The Florida Bar, through its Assistant Executive Director, opposed the hearing, Record, Item 5, and the Supreme Court of Florida, in an order dated May 6, 1970, denied the petitioner's request for hearing and ordered his suspension from the practice of law in the State of Florida. Record, Item 6; and, see Appendix B. Although the order of suspension had originally taken effect on June 8, 1970, *Id.*, the Supreme Court of Florida issued a later order on July 24, 1970, which stayed its prior order pending disposition by this Court of this petition. Record, Item 9.

---

[2] The Clerk of the Supreme Court of Florida, at the request of the petitioner, transmitted the Transcript of Record to this Court under date of July 27, 1970. The "Record" references are to the Items in that Transcript.

REASONS FOR GRANTING THE WRIT

1. The petitioner was convicted in the United States District Court for the Southern District of Florida for violating 18 U.S.C. § 1951. That conviction is presently on appeal to the United States Court of Appeals for the Fifth Circuit, as No. 30019. Notwithstanding the non-final nature of that conviction, the Supreme Court of Florida has ordered the petitioner's suspension from the practice of law. It has thus given for state purposes a finality to which that conviction is not entitled federally. See, for example, Rule 38, F.R.Crim.P. Although some cases may be found to the contrary, convictions have often been held not to attach until the accused has exhausted his available appellate remedies. See, for example, *Donnell* v. *Board of Registration*, 128 Me. 523, 149 Atl. 153 (1930); *Appeal of Smith*, 65 Conn. 135, 31 Atl. 529 (1894); see, also, *Brooks* v. *Auburn University*, 296 F.Supp. 188, 195 (M.D. Ala. 1969) *aff'd* 412 F.2d 1171 (5th Cir. 1969) ("In most instances lawyers would use 'convicted' to refer to a final conviction after all appeals had been exhausted.").

In the federal system, appeals from a judgment of conviction are matters of right. *Rodriguez* v. *United States*, 395 U.S. 327, 329-330; *Coppedge* v. *United States*, 369 U.S. 438, 441. They are invoked by the simple expedient of a Notice of Appeal, Rule 4(b), F.R.App.P., and the subsequent timely transmission and docketing of the record in the appropriate court of appeals. Rules 10, 11, 12, F.R.App.P. Each such action has been taken on this petitioner's federal appeal. During the pendency of an appeal from a federal conviction, the conviction is not considered final. Yet, by its action here, the Supreme Court of Florida has

effectively precluded the petitioner from the practice of his chosen profession *solely* on the ground of a federal conviction, notwithstanding the non-finality of that conviction. If the federal conviction is reversed, the petitioner will have stood suspended for a substantial period of time without cause. The constitutional propriety of that action calls for review by this Court.

2. Interspersed with the foregoing question, is the question of whether the action of the Supreme Court of Florida, and Rule 11.07 of The Integration Rule of the Florida Bar, places an unconstitutional burden upon the federal right of appeal. As indicated, appeals from a federal criminal conviction are matters of right assuming certain procedural requirements to be met. All such requirements have been met in this case. The Integration Rule of the Florida Bar, however, and the action of the Supreme Court of Florida taken thereunder burdens that right of appeal. Under the Rule, reprinted as Appendix A to this petition, the suspension remains in effect until "final disposition of the criminal cause, unless modified or terminated by the Supreme Court." Reversal of the criminal conviction automatically terminates the suspension, but affirmance of the conviction may call for further disciplinary proceedings, proceedings identical to those which would have occurred if the conviction had been allowed to become final without appeal. Take, for example, the situation of a lawyer, similarly situated to the petitioner, who did not appeal, who served his sentence and, at an appropriate time thereafter, moved for reinstatement to the bar and had his application granted. All things being equal, this petitioner, having exercised his federally granted right of appeal, should the decisions on appeal be adverse to him, would not

be in a position to move similarly for reinstatement until a period of time substantially longer than that of our hypothetical lawyer who did not appeal. If his reinstatement was then granted, he would have served a longer suspension simply by virtue of having appealed. By placing this petitioner in such a situation, the state has effectively placed a burden upon this petitioner's federal right of appeal, and this Court has held that states may not burden federal rights.

3. This Court has held that disbarment is a punishment and that disciplinary proceedings are "adversary proceedings of a quasi-criminal nature." *In Re Ruffalo*, 390 U.S. 544, 550, 551. Basic to adversary proceedings is notice and the right to be heard. While we concede that, in this case, the petitioner received notice of the institution of disciplinary proceedings against him, by denying his Motion for Hearing, Record, Item 2, 6, the Supreme Court of Florida failed to consider that the summary nature of the petitioner's suspension violated the due process principle implicit in *Slochower* v. *Board of Higher Education of the City of New York*, 350 U.S. 551. Reasonable notice and an opportunity to be heard is a bare minimum of due process. *In re Oliver*, 333 U.S. 257. This Court held, in *Bradley* v. *Fisher*, 80 U.S. 646, 652, that the withdrawal of attorney's right to practice required the same procedural safeguards as would be required to take away other property rights. *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232. These rights include a hearing. While *Ruffalo* involved disbarment and not suspension, the difference between the two is more illusory than real, for disbarment is nothing more than permanent suspension and suspension nothing less than temporary

disbarment. *In Re Metheany,* — Ariz. —, 449 P.2d 609 (1969). The writ should issue to determine the validity of the Integration Rule of the Florida Bar, and the action of the Florida Supreme Court thereunder, in suspending this petitioner without hearing, as measured against this petitioner's federal constitutional rights.

CONCLUSION

For the foregoing reasons, petitioner prays that the writ issue to review the judgment of the Supreme Court of Florida.

Respectfully submitted,

RAYMOND W. BERGAN
1000 Hill Building
Washington, D. C. 20006
Counsel for Petitioner

APPENDIX A

Integration Rule of the Florida Bar
225 So.2d 881 (1969)

RULE 11:07: DISCIPLINE UPON CONVICTION

(1) *Determination or judgment of guilt.* Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial or plea of any crime or offense that is a felony under the laws of this State, or under the laws under which any other court making such determination or entering such judgment exercises its jurisdiction, shall be conclusive proof of the guilt of the offense charged for the purposes of these rules. Upon such determination or entry of such judgment of guilt by any court of this state, the judge or the clerk thereof shall transmit a certified copy of such determination or judgment to the Clerk of this Court and to the Executive Director of The Florida Bar.

(2) *Suspension by judgment (Florida).* If such judgment of guilt is entered by a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the entry of the judgment unless he shall before that day file a petition with the Supreme Court to modify or terminate such suspension as elsewhere provided. If such petition is filed on or before the 10th day following the entry of the judgment, the suspension will be thereby deferred until entry of an order upon the petition.

(a) *Petition to modify or terminate suspension.* At any time after the entry of a judgment of guilt, the convicted attorney may file a petition with the Supreme Court to modify or terminate such suspension and shall serve a copy thereof upon the Executive Director. An opportunity to respond to the petition and appear at any hearing on the petition shall be afforded to The Florida Bar. If such petition is filed after the tenth day following the entry of judgment of guilt, the suspension shall remain in effect

pending disposition of the petition. Modification or termination of suspension shall be granted only upon a showing of good cause.

(b) *Continuation of suspension until final disposition.* If an appeal is taken by the convicted attorney from the judgment of this trial court in the criminal proceedings, and on review the cause is remanded for further proceedings, the suspension shall remain in effect until the final disposition of the criminal cause unless modified or terminated by the Supreme Court as elsewhere provided.

(c) *Termination of suspension.* Such suspension shall continue until final disposition of the criminal cause unless sooner terminated by order of the Supreme Court as elsewhere provided. A final disposition of the criminal cause resulting in acquittal will terminate the suspension. A final termination of the criminal cause resulting in a determination or judgment of guilt shall continue the suspension until expiration of all periods for appeal and rehearing, and until after termination of disciplinary proceedings by The Florida Bar as elsewhere provided.

(3) *Suspension by judgment* (other than by state court). If any such determination or judgment of guilt is entered by any court other than a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the filing with the Clerk of the Supreme Court of a certified copy of such determination or judgment, accompanied by proof of service of notice of such filing upon the convicted attorney; provided, however, that if the convicted attorney shall prior to the 11th day file a petition with the Supreme Court to modify or terminate the suspension, then the suspension will be deferred until entry of an order upon the petition.

(4) *Disciplinary judgment after conviction.* If a determination or judgment of guilt of a felony is entered against a member of The Florida Bar and becomes final without appeal or by affirmance on appeal, such judgment

shall be conclusive proof of the guilt of the offense charged. The Florida Bar may thereafter petition the Supreme Court for issuance of a notice to the convicted attorney to show cause why appropriate disciplinary judgment should not be entered. The respondent attorney may, within fifteen (15) days, file his return with the Clerk of the Supreme Court. The Court shall direct such further proceedings as may be appropriate.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1970
Wednesday, May 6, 1970

Case No. 39,642

THE FLORIDA BAR, *Petitioner,*

v.

GEORGE KASTENBAUM, *Respondent.*

Upon consideration of motion for hearing and petition for suspension, it is ordered that respondent's motion for hearing be and the same is hereby denied, and it is further

ORDERED that the Bar's petition for suspension be and is hereby granted and respondent, George Kastenbaum, is hereby suspended from the practice of law in the State of Florida pursuant to the provisions of Article 11.07(3) of the Integration Rule of The Florida Bar provided, however, this order of suspension shall not become effective until June 8, 1970, to allow respondent to wind up his practice.

A True Copy
TEST:
SID J. WHITE
Sid J. White
Clerk Supreme Court

cc: Messrs. Beckham & McAliley
Honorable Marshall R. Cassedy
Honorable Richard McFarlain